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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

YEI-WEI TONG,

Plaintiff and Appellant,

v.

DAVID E. BROCKWAY et al.,

Defendants and Respondents.

B171367

(Los Angeles County
Super. Ct. No. BC268292)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kenneth Freeman, Judge. Affirmed.

Law Offices of Ricky W. Poon and Ricky W. Poon for Plaintiff and Appellant.

Root, Brockway & Rothblatt, David E. Brockway, in pro. per., and Rebecca Elayche for Defendants and Respondents.

* * * * *

Appellant Yei-Hwei Tong appeals from a judgment entered after the trial court granted the motion for summary judgment of respondents David Brockway and Robert Luu (referred to as Brockway and Luu, respectively, and collectively as respondents). We affirm.

CONTENTIONS

Appellant contends that the trial court erred in granting respondents' motion for summary judgment and abused its discretion in awarding costs to respondents. Respondents ask us to declare appellant a vexatious litigant.

FACTS AND PROCEDURAL HISTORY

Brockway was retained to represent appellant in a criminal battery case in June 2000. The records of the Pomona Police Department show that on June 11, 2000, appellant and another customer at a laundromat became involved in an argument over the use of folding tables. Appellant summoned her husband, Shong-Ching Tong (Tong), for assistance. When an employee of the laundromat (the victim) told appellant to stop arguing, appellant began spitting on the folding tables and on the victim. At this point a police officer arrived and interviewed witnesses. The victim then placed appellant under citizen's arrest for battery under Penal Code section 242.

On several occasions, Brockway advised appellant to accept a plea bargain reducing the charge to an infraction and a fine of \$50. Appellant refused the offer and demanded a jury trial. On February 27, 2001, trial commenced. On February 28, 2001, the jury returned a guilty verdict. Appellant was placed on probation for three years and ordered to pay a fine of \$300, a state penalty fund assessment of \$510, a restitution fine pursuant to Penal Code section 1202.4, subdivision (b) of \$100, to cooperate in a plan with the probation officer for domestic violence counseling for 52 weeks, and to stay away from the victim. The jury verdict was affirmed on appeal.

On February 15, 2002, appellant and Tong filed a complaint against Brockway and his legal assistant, Luu, for breach of oral and written contract, common counts, breach of

fiduciary duty, “intentional tort,” fraud and negligence. Respondents’ motions for change of venue and transfer were denied. On November 20, 2002, the trial court granted respondents’ motion for an order requiring Tong to post security, as he had been declared a vexatious litigant. When Tong failed to post security, the trial court dismissed him as a plaintiff.

On August 27, 2003, the trial court granted respondents’ motion for summary judgment against appellant. Respondents filed their memorandum of costs, requesting \$455. After reviewing appellant’s motion to tax costs, the trial court ordered appellant to pay \$428.

This appeal followed.

DISCUSSION

I. Standard of review

Summary judgment is granted if all the submitted papers show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c);¹ *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.*, at p. 850.) The burden of production then shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*)

A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that an affirmative defense to that cause of action exists. (§ 437c, subd. (o); see *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1724.) Once the defendant’s burden is met, the burden shifts to the plaintiff to show that

¹ All further statutory references are to the Code of Civil Procedure.

a triable issue of fact exists as to that cause of action. (§ 437c, subd. (p).) The plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*)

In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. (*Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.) We must determine whether the facts as shown by the parties give rise to a triable issue of material fact. (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 990.) In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. (*Ibid.*)

II. Whether the trial court erred in granting respondent's motion for summary judgment

Appellant urges that the "actual innocence" rule articulated in *Wiley v. County of San Diego* (1998) 19 Cal.4th 532 (*Wiley*) does not apply to bar her action against respondents. We disagree.

In *Wiley*, our Supreme Court held that actual innocence is a necessary element of the plaintiff's cause of action in a criminal malpractice action because allowing a convicted criminal to pursue a legal malpractice claim without proof of innocence would let him or her profit by his or her own wrong, shifting responsibility for the crime to the attorney. (*Wiley, supra*, 19 Cal.4th at pp. 537-545.) Additionally, a guilty defendant has an adequate remedy in the form of postconviction relief for ineffective assistance of counsel. (*Id.* at pp. 542-543.) In order to establish actual innocence, an individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201.) This is so because a criminal defendant, unlike a civil defendant, comes with a full panoply of rights and privileges that entitles him or her to a second chance; criminal defendants have the right to effective assistance of counsel; a convicted criminal should not be permitted to shift responsibility for his or her predicament to former criminal defense counsel; inconsistent verdicts in favor of the convicted criminal

would create conflict; and the requirement precludes duplication of ineffective assistance of counsel issues in a legal malpractice action. (*Id.* at pp. 1203-1204.)

The actual innocence requirement applies in legal malpractice claims brought by criminal defendants. (*Barner v. Leeds* (2000) 24 Cal.4th 676, 679.) In *Lynch v. Warwick* (2002) 95 Cal.App.4th 267, 273 the plaintiff filed a complaint against his attorney, Thomas Warwick, for legal malpractice, breach of contract, and breach of fiduciary duty arising out of the attorney's representation of him in several criminal matters. According to the complaint, the day before the plaintiff's criminal trial, Warwick advised him to plead guilty. The plaintiff insisted on going to trial, obtained new counsel, continued the trial date, and eventually pleaded guilty to charges of kidnapping and assault with a deadly weapon. In his complaint, the plaintiff alleged that had Warwick exercised proper care, skill, and diligence and employed a reasonable defense, he would not have been forced to fire Warwick and retain other legal counsel. The Fourth Appellate District determined that plaintiff's attempt to style his complaint as one for breach of contract did not hide the fact that he was seeking recovery on a tort theory for negligence. (*Ibid.*) The court concluded that the actual innocence requirement for a criminal legal malpractice case applies regardless of whether the plaintiff seeks damages for wrongful conviction, a longer sentence, or for attorney fees, and affirmed the judgment.

Here, appellant's action against respondents is for legal malpractice. The complaint alleges that respondents failed to investigate her case; enforce her informal discovery requests; review the incident scene; prepare the case for trial; seek writ review; file a motion to disqualify a judge; and prevent a commissioner from hearing the case. She complains that Brockway was unfamiliar with criminal law and procedure and should not have waived time after trial for sentencing. Under the aforementioned authorities, we conclude that summary judgment was properly granted by the trial court against appellant.

On appeal, appellant seeks to except herself from the enunciated rules by citing to *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 472 (*Bird*). In that case, the court held that where the lawsuit is based on the right to be billed

in accordance with the terms of the retainer agreement and the right not to be subjected to unconscionable, fraudulent, or otherwise unlawful billing practices, a breach of contract action, unlike a malpractice action, may go forward. Since the guilt or innocence of the criminal defendant is not at issue and does not implicate the same policy considerations in a malpractice action, the quantity of the work, as opposed to the quality of the work, may be litigated. (*Id.* at pp. 428-429.) Here, however, much as appellant would like to characterize her complaint as a fee dispute, the gravamen of her complaint focuses solely on respondents' handling of her criminal matter. We conclude that *Bird* does not apply.

Nor are we convinced by appellant that summary judgment should not have been granted because Luu is not an attorney. He was sued on the same theory as Brockway, for malpractice in a criminal matter.

III. Whether the trial court abused its discretion in awarding costs

Under sections 1032 and 1033, the trial court has the discretion to award costs to the prevailing party. Section 1033.5 includes filing and motion fees as allowable costs. Appellant contends that the trial court abused its discretion in awarding the fees, because respondent merely listed the total of his filing fees on the memorandum of costs and did not itemize them.

The record shows that respondents filed a memorandum of costs requesting filing and motion fees of \$455. The trial court granted appellant's motion to tax costs in part, and ordered appellant to pay the amount of \$428. We take judicial notice of the filing fees of an answer and motion to be \$165 and \$294.20 per party, respectively, in the Los Angeles Superior Court. (Evid. Code, § 452.) Since our review of the record indicates that an answer as well as a summary judgment motion was filed on the part of respondents, we conclude that appellant has failed to show abuse of discretion.

IV. Whether appellant should be declared a vexatious litigant

In their opposition, respondents request that appellant be declared a vexatious litigant, but do not cite to any authority or to the record. On that ground alone, we may

treat the request as waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) In any event, our review of the record shows that appellant filed a letter explaining that the litigation has merit and was not taken for purposes of harassment or delay pursuant to section 391.7, subdivision (b).² In opposition, respondents referred to an internet search result purporting to show that appellant was the plaintiff on numerous cases. However, the attachment does not show, as required by section 391, that appellant commenced at least five litigations that have been finally determined adversely to her, or repeatedly filed unmeritorious motions. We therefore decline respondents' request to declare appellant a vexatious litigant.

DISPOSITION

The judgment is affirmed. Respondents shall receive costs of appeal.

NOT FOR PUBLICATION.

_____, J.
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We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

² Section 391.7, subdivision (b) allows the presiding judge to permit a vexatious litigant to file new litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.